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IN THE

Supreme Court of the United States

October Term, 1967

No. 972

JACQUES ARLEY and CHARLOTTE ARLEY,
Petitioners,

v.

UNITED PACIFIC INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN CAUGHLAN
Attorney for Petitioners

620 Arctic Building
Seattle, Washington 98104

METROPOLITAN PRESS — SEATTLE, WASH.

SUBJECT INDEX

	Page
Citations To The Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons Why The Writ Should Be Granted	8
Conclusion	18

Appendices:

Appendix A	Opinion Of The United States Court Of Appeals For The Ninth Circuit	A-1
Appendix B	Order Denying Motions For New Trial And For Judgment Notwithstanding Verdict	A-11
Appendix C	Instructions Of The Court	A-13
Appendix D	Oregon Statutes	A-19

TABLE OF AUTHORITIES

Table of Cases

American Fire Insurance Company v. King Lumber and Mfg. Company,
250 U.S. 2, 39 S.Ct. 431, 63 L.Ed. 810 ..... 8, 10, 12

Di Giovanni v. Camden Fire Ins. Assn.,
296 U.S. 64, 56 S.Ct. 1, 80 L.Ed. 47 ..... 16, 17

Enelow v. New York Life Ins. Co.,
293 U.S. 379, 55 S.Ct. 310, 79 L.Ed. 440 ..... 16, 17

Ettelson v. Metropolitan Life Ins. Co.,
317 U.S. 188, 63 S.Ct. 163, 87 L.Ed. 176 17

Page

Herbring v. Lee, (1928) 126 Ore. 588, 269 Pac. 236, 60 A.L.R. 1165, 280 U.S. 111, 50 S.Ct. 49, 74 L.Ed. 217 ..... 8, 12

LaTourette v. McMaster, 248 U.S. 465, 39 S.Ct. 160, 63 L.Ed. 362 12

Lovejoy v. City of Portland, 95 Ore. 459, 188 Pac. 207 (1920) 8

Mock v. Glen Falls Indemnity Company, 210 Ore. 71, 309 P.2d 180 (1957) 10, 11, 12

Osborn v. Ozlin, 310 U.S. 53, 84 L.Ed. 1074, 60 S.Ct. 758 ..... 10, 12

Robertson v. California, 320 U.S. 440, 66 S.Ct. 1160, 90 L.Ed. 1366 12

Stipcich v. Metropolitan Life Ins. Co., 277 U.S. 311, 48 S.Ct. 512, 72 L.Ed. 895 ..... 10-11, 12

Statutes

Oregon Laws 1917, Ch. 202, 4a, p. 323 9

Ch. 203 3

Oregon Laws 1923, Ch. 79 3

Ch. 79, §1 and 2 9

Oregon Laws 1943, Chap. 445 3

Oregon Laws 1947, Chap. 373 3

Oregon Laws 1965, Ch. 324, §2 8-9

Ore. Rev. Statutes §736.003 8

005 4

005(3)(e)(f) 3, 9

405(1) 9

410 9

415 9

425 4

Page

Ore. Rev. Statutes §736.430 4
440 ..... 4, 9
445 ..... 4, 9
§§750.210-750.270 ..... 3, 9
28 U.S.C. §1254(1) 2

Textbooks

Richards, *Law of Insurance*, 5th ed., 257 10

Other Authorities

Federal Rules of Civil Procedure,
Rules 2, 7(a), 8(b) and 13(a) 16

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 9, 1967.

CITATIONS TO THE OPINION BELOW

The opinion of the Court of Appeals (CT,[1] Opinion, ff. CT 94) is reported in 79 F.2d 183, and is printed in the appendix to this petition, pages A-1 to A-10 below. No Opinion of the district court was reported. An order and opinion of the district court denying petitioner's motion for a new trial, (CT 71), is printed in the appendix, pages A-11 to A-12.

1. The clerk's transcript is designated CT throughout. The reporter's transcript is designated RT.

JURISDICTION

United Pacific Insurance Company[2] alleged in the district court that it was a Washington corporation and that petitioners, defendants below, were residents of Oregon, and that the amount involved was in excess of $10,000.00. Except for these allegations there was no specific reference to the statutory basis of federal jurisdiction in the district court, which presumably rested on 28 U.S.C. §1332.

The decision of the Court of Appeals affirming the district court judgment for United Pacific was entered on June 9, 1967. (CT ff. CT 94). A timely petition for rehearing was filed which was denied August 1, 1967. By an order dated October 24, 1967, petitioners were granted an extension of time to December 29, 1967, within which to file the petition. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the court below engage in judicial legislation and create a large class of unlicensed insurance producers in the state of Oregon in deciding that an insurance solicitor who told his customer prior to a fire loss that her property was insured, was acting as a broker and as an agent for the insured rather than as a sub-agent for the insurer, and did it thus decide an important question of Oregon law in a way which is in conflict with the applicable state law, depriving the insured of the benefit of state enactments designed to protect the insurance buying public against such practices.

2. Did the court below sanction a substantial departure

2. Hereinafter referred to as United Pacific.

from the accepted and usual course of judicial proceeding when it upheld the district court's rulings:

(a) instructing the jury so as to make uncontested facts contested issues and mixing these with unresolved issues of law which should have been decided by the trial court, thus, in effect, depriving petitioners of either a trial by jury or a trial to the court without a jury;

(b) authorizing the maintenance of an equity suit by an insurance company to rescind an insurance policy after the fire loss had occurred, thus depriving the insured of substantial procedural advantages in choice of forum, opening and closing, and formulation of proper factual issues for determination by jury;

(c) transforming an equity suit into a declaratory judgment action on court's own motion by compelling the filing of a counterclaim by petitioners, for the stated purpose of affording a jury trial; and

(d) in obtaining, in effect, an advisory jury verdict on issues of law, making it impossible for review purposes to determine what issues of fact had been decided, or what conclusions of law supported the judgment.

STATUTES INVOLVED

The state statutes involved, which are referred to in this petition are set forth in full in Appendix D, pages A-19 to A-24, below. They are Oregon Laws, 1923, Chapter 79, now included in Oregon Revised Statutes, §§750.210 to 750.270; Oregon Laws, 1917, Chapter 203, and Oregon Laws, 1943, Chapter 445, now included in or replaced by Oregon Revised Statutes §736.005 (3) (e) and (f); Oregon Laws, 1947, Chapter 373, now Oregon Revised Statutes,

§736.445; and Oregon Revised Statutes, §§736.005, 736.425, 736.430, 736.440, and 736.445.

STATEMENT

On October 30, 1962, petitioner Charlotte Arley, who lived in Portland, Oregon, ordered a policy of fire insurance from Roger Chaney, who was a licensed solicitor for the Larry Nelson Agency, which agency was a licensed agent of the United Pacific Insurance Company, a Washington corporation. (RT 187-189; RT 8, lines 17-20; RT 19, lines 22-25; RT 69, Ex. 11; RT 213; RT 141-142).[3]

On October 30, 1962, Chaney told Mrs. Arley, "We can cover you with United Pacific" (RT 187) and was handed a memorandum of the insurance requirements of Mrs. Arley, including a description of the property and her statement of the valuation and the amount of insurance to be written[4] (RT 188), and Chaney told her, words to the effect "you are covered." (RT 90).[5]

On January 15, 1967, the property which Chaney had bound orally was seriously damaged by fire (RT 227). Mrs. Arley immediately notified United Pacific's agent, Larry Nelson, of the loss (RT 33, RT 227). On or about

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3. RT: Reporter's transcript. CT: Clerk's transcript. The clerk of the court below has advised that pagination of the clerk's transcript and the reporter's transcript is not consecutive, and has further advised that the proceedings in the Court of Appeals are not paginated consecutively to the clerk's transcript in the district court.

4. $17,500.00 on the dwelling; $5,000.00 on a separate unit.

5. Chaney admits that he told Mrs. Arley that she had insurance coverage on October 30 or 31, 1962. He stated that he did not recall that he mentioned the name of the company in which she was covered. (RT 90). However, at that time, October 30 or 31, 1962, United Pacific was the only insurance company for which Larry Nelson was general agent, which was licensed to write insurance both in Oregon and in Nevada. (RT 97-98).

March 5, 1963 (RT 229), petitioners received a policy of insurance from the United Pacific Insurance Company, which was dated January 12, 1963. (RT 229). Chaney had requested United Pacific to write this policy on January 17, 1963, and as a part of the order requested that the policy be made effective as of January 12, 1963 (RT 76, Ex. No. 8 RT). A statement for premium on the policy accompanied the policy which was delivered to the Arleys on or about March 5, 1963. The premium was promptly paid by the insured petitioners.

On April 4, 1963, United Pacific commenced this action in the United States District Court for the Oregon District by filing a complaint entitled civil complaint in equity for rescission, alleging that the Arleys had failed to disclose to plaintiff at the time the policy was requested on January 17, 1963, that the insured property had been seriously damaged by fire (CT 2-6). The theory of the company's complaint was that the Arleys had concealed the fact of extensive damage by fire on the 15th of January, 1963, when the policy of insurance "was requested on the 17th day of January, 1963" and that because of this concealment the policy was issued under a mistake of fact as to the existence of the property involved and as to the existence of a contract (CT 3) and that the value of the property insured was misrepresented (CT 19). The underlying theory of the complaint was apparently that Roger Chaney, licensed solicitor for the authorized agent of the company, Larry Nelson, was an agent of the Arleys, and not an agent of United Pacific (CT 19, ff.).

The Arleys sought summary relief of dismissal of the complaint on the fact that the insurance had been ordered through an authorized agent of the company, that

having been told that "they were covered under a United Pacific policy" it was their right to proceed to prove damages and recover under the terms of the policy issued, in an appropriate forum of their choosing, i.e. in the State of Nevada where the loss occurred and where they had commenced an action at law against United Pacific (CT 25, 30-31), and that United Pacific's suit in equity for rescission was at most an equitable defense which should properly be asserted in the action at law brought by them in Nevada (CT 36). Hence, the Arleys claimed, the court lacked proper equity jurisdiction to try the case brought by United Pacific, and the venue of the action was properly in Nevada (CT 36-37).

The Arleys' claims were rejected by the district court, who, on its own motion, proceeded to try the case as a request for declaratory relief by United Pacific before a jury, which was first to try the segregated issue of validity of the policy on United Pacific's prayer for recission of the policy (RT 2). Petitioner was ordered to file a counterclaim for damages in the district court, to be tried as a second part of the segregated issue (Ct 48-49).

United Pacific insisted, to the very moment of the submission of the case to the jury, that this was an equitable case for determination by the court on the theory of rescission, and that the issue was not appropriate to submit to the jury (RT 251). A special interrogatory form of verdict was requested by United Pacific without objection by the Arleys, but the court declined to submit an interrogatory form of verdict because "if we get into interrogatories we are getting into what issue is this, and what issue is that, and we will have all the little side issues involved." (RT 254)

The court instructed the jury that the issue was whether "Chaney . . . was acting as agent for the defendants" or whether he was "acting within the scope of his authority as a solicitor" and "agent of the Nelson Company" when "he told Mrs. Arley that this property was covered by insurance; that the insurance company was United Pacific Insurance Company . . . [and] that the amount of insurance was fixed and that the insurance was in effect as of that time." (RT 256). The court further instructed the jury that the issue was whether "Roger Chaney on the 16th of January . . . was acting as broker and agent for the defendants [the Arleys] in attempting to secure this insurance on this property rather than for the plaintiff [United Pacific]" and "that he wilfully concealed and did not disclose the fact [that a fire loss had already occurred] to the insurance company at the time the application for insurance was made (RT 255-256)." Neither the fact that Chaney was a sub-agent of United Pacific nor the fact that he did not advise the principal of the prior fire loss when the policy was issued were in dispute on the record.

The court in its memorandum opinion denying a motion for a new trial indicated that if the case was improperly tried before a jury, the court itself would have reached the same conclusion on the facts "as the jury reached." (CT 69).

The judgment of the district court was appealed. The court below in its opinion of June 9, 1967, held that Chaney, under Oregon law, "was acting as a broker," that is, as an agent for the the Arleys in procuring insurance with United Pacific. Hence, his acts in failing to disclose the loss to the insurance company prior to the request for

the issuance of the policy on January 17th was attributable to the Arleys. (Appendix, A-7 to A-9, below) The Court of Appeals further stated that if a contrary result were reached and if the Oregon statutes were read as prohibiting resident brokers "grave constitutional problems" would be presented and that therefore the pertinent statutes should be construed so as to avoid these problems (CT: ff CT 94 Opinion).

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

The court below decided an important question of state law in a manner in conflict with the applicable law of the state of Oregon, which, to protect the insurance buying public, makes licensed insurance agents and solicitors agents of the insurer rather than agents of the insured. *American Fire Insurance Company v. King Lumber and Mfg. Company,* 250 U.S. 2, 39 S.Ct. 431, 63 L.Ed 810.

For many years Oregon has had a comprehensive insurance code defining in detail the relationships of persons in the business of selling insurance to the public, as agents of insurance company principals for whom they act, and the relationship through this agency of insurers to the public. See *Lovejoy v. City of Portland,* 95 Ore. 459, 188 Pac. 207, 212 (1920); *Herbring v. Lee,* (1928) 126 Ore. 588, 269 Pac. 236, 239, 60 A.L.R. 1165; *Herbring v. Lee,* (1929) 280 U.S. 111, 50 S.Ct. 49, 74 L.Ed. 217. These enactments are explicitly designed "for the protection of the insurance-buying public" and are to be liberally construed . . . to give effect to this policy." [Oregon Revised Statutes[5a] §736.003; Ore. L. 1965, Ch.

5a. Cited hereinafter as "ORS."

324, §2], which is simply a restatement of preexisting policy. The law defines an insurance agent as "any person who solicits insurance, receives an application or order to write, renew or procure any policy or collect any premium, or who attempts as middleman to place any insurance in this state. . . ." Ore. L. 1917, Ch. 202, §4a, p. 323, appendix below. Cf. ORS §736.005(3) (e) and (f).

The appointment of an agent is made by a licensed insurance company which files its appointment with the insurance commissioner. The commissioner thereupon licenses the appointee as agent of the company if he is found qualified as to residence, character and ability. [ORS §§736.405 (1) and 736.415]. Solicitors are appointed by licensed agents as their agents *"to solicit contracts of insurance solely on behalf of such agents"* [emphasis added], and are similarly licensed by the commissioner of insurance. [ORS §§736-005 (3)(f), 736.410 and 736.415]. Transactions in insurance except by agents and solicitors or their employees or direct employees of insurance companies is made a crime. [ORS §736.440]. Brokers in the sense of persons acting on behalf of the insured to procure insurance as distinguished from agents and solicitors who act as agents of their companies are not recognised in Oregon law, excepting for a special category of licensed "non-resident brokers" totally unrelated to the status of any of the parties involved in this litigation. (ORS §§750.210-750.270, Ore. L., 1923, Ch. 79 §1 and 2). No person may directly or indirectly solicit insurance without a license. ORS §736.445. Thus all classes of persons dealing in insurance in any manner affecting the public

are embraced within the regulatory and prohibitory provisions of the statutes.

Oregon is thus one of the several states whose laws prohibit brokers from transacting insurance business with the general public and which thus place the insurance purchasing public in a direct relationship with the insurer through authorized agents of the companies.[6] See *American Fire Insurance Co. v. King Lumber and Mfg. Co., supra,* 250 U.S. 2, 39 S.Ct. 431, 63 L.Ed. 810.

The fire insurance received by petitioners, and which is the subject matter of this case, was issued through a licensed and authorized agent of United Pacific and was bound through the sub-agent solicitor. There is no issue on the record in this case as to the fact that the solicitor and agent of United Pacific told Mrs. Arley that she was covered ten weeks before the loss occurred and that the fact of the loss was made known to the company's authorized agent at the time the ten-weeks binder became an issued insurance policy pre-dating the loss. Under well settled Oregon law, and indeed under general insurance law, United Pacific was legally bound to the contract its agent had made. *Mock v. Glen Falls Indemnity Company* 210 Ore. 71, 309 P.2d 180 (1957). See *Stipcich v.*

6. It is apparently solely because of the special provision authorizing non-residents to engage in brokerage transactions that Oregon is not generally included in the list of states which totally prohibit brokers from writing insurance business. See Richards, "Law of Insurance," 5th ed., 257, footnote 5. The exception with respect to non-resident brokers is undoubtedly made for the reasons discussed by Mr. Justice Frankfurter in *Osborn v. Ozlin,* 310 U.S. 53, 84 L.Ed. 1074, 60 S.Ct. 758, that is the broker "meets . . . the needs of large customers, using their concentrated bargaining power to obtain the most favorable terms from competing companies. His activities, being largely confined to the big commercial centers, take place mostly outside" the state.

Metropolitan Life Ins. Co., 277 U.S. 311, 48 S.Ct. 512, 72 L.Ed. 895.

Since all of the significant transactions from the original binder to the belated issuance of the policy were accomplished through authorized and licensed agents of United Pacific, the importation of the term of "broker" and United Pacific's claim that a licensed agent or a licensed solicitor could act for the insured petitioners rather than for the company which authorized and licensed the agent is in direct conflict with Oregon statutory and decisional law, as well as being in conflict with general insurance law. Such a concept is entirely outside the comprehensive statutory plan of the state as interpreted by its highest court. See *Mock v. Glen Falls Indemnity Co., supra.*

The Court of Appeals for the Ninth Circuit in purporting to interpret the pertinent statutes of Oregon as authorizing "brokers" and in defining a "broker" under Oregon law as a person who "does not represent an insurance company but places insurance with whatever company he can induce to insure the risk" and as one who "is not the agent of the insurer but rather the agent of the one seeking insurance" created a new class of insurance "producers" who can solicit and effect insurance entirely outside of the statutory plan. This is intolerable judicial legislation, and clearly indicates the urgent necessity of review by this court.

Review is further indicated by the manner in which the court below attempts to buttress erroneous interpretation of Oregon's legislative policy to prohibit "brokers" as thus judicially defined in general transactions between the insuring public and insurance companies and their

agents. The court finds "grave doubts regarding the constitutional validity" of the statutory plan of Oregon if non-resident brokers are allowed but resident brokers prohibited. Such doubts are wholly imaginary.[7] The reasonableness of substantially similar state legislative classification has already been passed upon by this court in *Osborn v. Ozlin, supra,* 310 U.S. 53. And at least since *LaTourette v. McMaster*, 248 U.S. 465, 39 S.Ct. 160, 63 L.Ed. 362, cited in *Herbring v. Lee,* (1928) 126 Ore. 588, 269 Pac. 236, 239, (1925) 280 U.S. 111, 50 S.Ct. 49, 74 L.Ed. 217, there can be no doubt of a state's right under the Constitution to make regulatory distinctions between resident and non-resident insurance brokers.

Moreover, the decision below does violence to the whole purpose of Oregon's regulatory and prohibitory legislation which is "for the protection of the insurance-buying public." See *Robertson v. California*, 320 U.S. 440, 66 S.Ct. 1160, 90 L.Ed. 1366. The public should be entitled to rely upon assurance of coverage by authorized company agents. *Mock v. Glen Falls Indemnity Co., supra.* The public is entitled to protection against defenses based upon alleged lack of authority when dealing with agents of an insurance company. *American Fire Insurance Co. v. King Lumber Co., supra.* It should be protected from claims of "concealment or non-disclosure" when full disclosures are made to agents. *Stipcich v. Metropolitan Life Insurance Co., supra.* If "agents" may be "brokers," though no such class has existed in Oregon insurance

7. It is significant that the district court judge after using the term "broker" in his original instructions to the jury, attempted to reinstruct the jury by telling them to disregard that term, and stating, "Of course, I intended to speak of an agent. So wherever I mentioned "broker" during the course of the instructions you will consider that I was speaking of an agent."

law since 1917 a vertable Pandora's box, long tighly sealed both by legislative enactment and judicial determination in Oregon will be opened at least in federal court proceedings with most mischievous consequences to the buying public. A negligent or dishonest agent may then become a source of defense to the principal who appointed him. Not every litigant is in a position to carry his case though multiple appeals to the highest court of the land. The lid must be replaced upon the box, and the protections which Oregon intended for its insurance-buying public reinstated. This requires review of the decision below.

II.

The court below sanctioned a substantial departure from the ordinary course of judicial proceedings which resulted in effectively depriving petitioners of either a trial to the court sitting in equity with findings of fact and conclusions of law as provided by Rule 52 of the Rules of Civil Procedure, or a trial by jury upon instructions from which it could be determined what the jury had found as fact issues and upon which the verdict rested. This becomes fully evident upon examination of the district court's instructions to the jury in which the legal issues are hopelessly jumbled with undisputed facts in such a manner as to make a review of either factual or legal determinations of the court and jury impossible.[8]

The district court instructed the jury that, "it is [United Pacific's] contention that at the time this application for

8. Petitioners have set out the jury instructions in full as part of the appendix to this petition, pages A-13 to A-18, below. Only unexceptionable instructions on such matters as burden of proof, credibility of witnesses, etc. are omitted.

insurance was made by Roger Chaney on the 16th of January he was acting as broker and agent for [the Arleys] . . . rather than for [United Pacific] . . . , that he had knowledge that this property was already destroyed by fire and that he wilfully concealed and did not disclose this fact to the insurance company at the time the application for the insurance was made. . . . [The Arleys] deny this and say that it is not the fact. They state . . . that either on the 30th or the 31st of October, 1962, Chaney, while acting within the scope of his authority . . . told Mrs. Arley that the property was covered by insurance; that the insurance company was . . . United Pacific . . . ; that the amount of insurance was fixed; and that the insurance was in effect as of that time. . . . [T]his is denied by [United Pacific] . . . that there was any coverage as of that date. Those essentially are the issues which you are here to try."

But the Arleys *did not deny* (1) that Chaney had knowledge of the fire on January 16, 1963, or (2) that Chaney did not disclose his knowledge at that time to United Pacific. It was their contention that, *as a matter of law*, he and Larry Nelson for whom Chaney was subagent, were United Pacific for all purposes in dealings between the Arleys and the insurer, and that their report of the fire loss to the Larry Nelson agency was a report to United Pacific. Moreover, the jury was told in this portion of the instruction that "the application for insurance was made on the 16th of January" 1963. But this, of course, was between the agent and the company. The application by the Arleys had been made on October 30 or 31, 1962, to the Larry Nelson agency.

Similarly, it was not disputed on the record by United

Pacific that the Arleys were told by the Larry Nelson agency through Chaney that they were covered on October 30 or 31, 1962.[9]

United Pacific did contend, *again as a matter of law,* that Chaney was not their agent in binding the insurance to the Arleys in October, 1962, on the theory that he was acting beyond the scope of his authority because Larry Nelson's Nevada non-resident agent's license had lapsed at that time. (RT 13, 157).[10] This was not raised with respect to the actual issuance of the policy in 1963, when the authority of the agency was apparently insufficient to obtain a policy on the property.

Thus the jury was given uncontested and admitted *facts* as issues of fact, and undigested issues of law jumbled in with these facts, and asked to return a general verdict. Since it was obvious that the issuance of an insurance policy after a loss, with the request that the effective date of the policy pre-date the loss, would be financially detrimental to the insurance company, it is difficult to see how a jury of laymen, without most careful and explicit instructions from the court could reach any

9. Mrs. Arley testified that Chaney told her the coverage was in United Pacific, (RT 188), and that the amount was fixed in the conversation and in a memorandum she handed Chaney. (RT 188, 222-224) This was not denied by Chaney who admitted that he told her, "You are covered." (RT 93, 100) He did not specifically recall mentioning the name of the insurance company. (Rt. 90). He was not sure whether he received a memorandum from Mrs. Arley, (RT 104), but did not need one because "all the information was in the file." (RT 104).

10. Apparently the only reason for the delay in "writing the policy" was that Larry Nelson had allowed his non-resident agent's license from the state of Nevada to lapse, and the agency would not legally be entitled to share a commission with the agent in Nevada who countersigned the policy until their non-resident license was renewed. (RT 99). The non-resident license had been in effect shortly before the Arleys had applied for the insurance in October, 1962, and was in effect again after the policy had been issued. (RT 69, 157).

other conclusion than the one actually reached—that the person applying for a policy on January 16, 1963, for insurance on property which had burned on January 15th was acting on behalf of the insured rather than as agent of the insurance company.

Nothing in the district court's memorandum opinion and order denying a new trial (CT 71), clarifies the issues of fact which the verdict presumably resolved against petitioners. Thus, in effect, the jury verdict was no more than *an advisory verdict on an issue of law* which it was the duty of the courts and not of the jury to resolve. Under these circumstances petitioners were given the form, but not the substance, of a jury trial.

This melange of uncontested facts and unexplained law in the district court's jury instructions resulted from the court's attempt to meet the contention of the Arleys that the court should refuse to entertain an equity petition to rescind an insurance policy for concealment, fraud, misrepresentation or mistake after a loss had occurred. These grounds, petitioners urged, were at most equitable defenses which should be asserted in the action at law they had commenced against United Pacific in Nevada. *Di Giovanni v. Camden Fire Ins. Assn.*, 296 U.S. 64, 56 S.Ct. 1, 80 L.Ed. 47; *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed. 440. The district court concluded, with the sanction of the court below, that the Federal Rules of Civil Procedure, particularly Rules 2, 7(a), 8(b) and 13(a) authorized the proceedings in the district court, including a compulsory counterclaim which the court directed petitioners to file (CT 49). The effect of this procedure was to give to the

insurance company substantial procedural advantages against the insured: choice of forum, opening and closing, and a pre-determination of what were essentially equitable defenses to a fire-loss under an insurance policy.

It has not been determined by this court that such advantages should be given the insurance company under the Rules of Civil Procedure, or that the salutory policy which prevailed prior to the rules has been altered in any way to their adoption. Cf. *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188, 63 S.Ct. 163, 87 L.Ed. 176. This in itself is sufficient reason to call for review of the proceedings below.

But the substantial departure from the usual course of judicial proceedings in the lower courts goes much further in this case. It was the effort of the district court to meet petitioners' proper demands for a jury trial of the issues involved in the fire loss, and its disregard of the rule in *Di Giovanni* and *Enelow* which led the court to submit to a jury issues which were properly legal issues to be resolved by the court. If the court had sustained United Pacific's demand that the case be tried as an equity proceeding to the court without a jury, there would at least have been findings of fact and conclusions of law by the court upon which a proper review of the law and the facts could have been made by the court of appeals. If there had been a jury trial in Nevada on the fire loss, petitioners would have had the advantage of a trial in a forum of their choosing, and of opening and closing, and also of formulating the fact issues to be resolved by the jury. In this case petitioners have had neither the substance of a jury trial, nor a trial to the court

with reviewable findings of fact. In affirming the judgment of the district court, the court below thus sanctioned a substantial departure from sound judicial practice and from the usual course of judicial proceedings.

CONCLUSION

For the reasons which have been given, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN CAUGHLAN
Attorney for Petitioners

APPENDIX A

United States Court of Appeals For the Ninth Circuit

JACQUES ARLEY and CHARLOTTE ARLEY, husband and wife, *Appellants,* v. UNITED PACIFIC INSURANCE COMPANY, a Washington corporation, *Appellee.*	No. 20,099

[June 9, 1967]

Appeal from the United States District Court for the District of Oregon

Before: MERRILL and KOELSCH, Circuit Judges, and BOWEN, District Judge

KOELSCH, Circuit Judge. (Italics and other emphasis added.)

On March 1, 1963, United Pacific Insurance Company issued to Jacques and Charlotte Arley, husband and wife, its standard three year policy of fire insurance covering two buildings located on the Arleys' property in Nevada. *The policy had been ordered by one Roger Chaney on January* 17, 1963, *but at his request was back dated to make coverage commence January* 12, 1963.

A dispute over the validity of the policy arose between United and the Arleys because on *January* 15, *three*

days after the effective date of the policy but two days prior to Chaney's order, one of the buildings had been extensively damaged by fire.

When no agreement was reached, United (hereinafter plaintiff) commenced this suit in the United States District Court for the District of Oregon SEEKING RESCISSION OF ITS POLICY. The Arleys (hereinafter the defendants) moved for summary judgment and for dismissal of the action, but these motions were denied. They then commenced in *Nevada a suit for a money judgment* on the policy and *moved the court to transfer this suit to Nevada* or to stay proceedings pending the outcome of the litigation there. The court refused to do so and additionally *advised defendants that their claim against plaintiff ought to be presented to and determined in the same forum as plaintiff's* and that *they*, the defendants, ought to file a counterclaim. Apparently *they declined.* However, in the pretrial order, amongst the defendants' contentions, appears a *complete and detailed statement of their counterclaim coupled* with *a demand for jury trial in the event "defendants are compelled by this court to file a counterclaim."*

The cause was *tried to a jury* on the *segregated issue of plaintiff's liability.* The verdict being for plaintiff, the court entered judgment cancelling the policy and dismissing the counterclaim. We affirm.

Defendants have assigned thirty-nine errors. This in itself is of little moment, although it would seem an unduly extravagant multiplication of assignments in a case having a record of only 367 pages. But we do find fault with the manner in which the asserted errors are pre-

sented. Defendants, in their briefs, collect them into several principal groups and argue them together. This practice is not unusual, of course, and generally is helpful to a reviewing court. But here the defendants have grouped together components having nothing in common and oftentimes relevant (if at all) to a main subject other than the one being argued. As a result, we have been confronted with a veritable jig-saw puzzle.[1]

[1]To illustrate: Defendants' first specification of error reads: "1. The court erred in denying appellants' motion to dismiss for improper venue (R. 8, 14)." The only mention of venue made in the argument portion of the brief is this cryptic reference on page 37 of the opening brief:

"*Venue:*

Tr. 81 [a wrong citation]

Commonwealth v. Rutherfoord, 169 S.E. 909, 90 ALR 348

McGrath v. Zander, 179 F.2d 649 (Dist. Col. 1949)" [a wrong citation]

but even this intelligence is contained under main heading III entitled "Did the method of trial deprive appellants of their constitutional right to trial by jury" and this heading is stated to be "Directed to Specification of Error Nos. 5, 6, 7, 9, 13, 14a." The only one of these enumerated specifications that could remotely bear on venue is No. 5 which in terms is "The court erred in denying appellants' motion to stay proceedings or in the alternative to transfer to Nevada. (R. 36-39, 41, 42)."

A painstaking search of the record reveals that defendants made two venue motions:

A. Shortly after the action was commenced appellants moved its dismissal for "improper venue." Such a motion is recognized by Rule 12(b)(3). But if we presume from the meagre "argument" in the brief that the motion was grounded on 28 U.S.C. §1506(a), which provides for dismissal (or transfer) if the suit is laid in the wrong district, it was nevertheless rightly overruled. The record clearly shows the defendants maintained their home and were living in Portland, Oregon, where this action was commenced. Granting that defendants' supporting affidavits showed them to be citizens of Nevada, that fact was immaterial for the venue statute appropriate to this case (28 U.S.C. §1341(a)) provides that where jurisdiction is founded only on diversity of citizenship—as this one was—venue shall be laid only in the district where all defendants reside. The statutory criterion is residence, not citizenship. The terms are not synonymous. *Townsend v. Bucyrus-Erie Co.*, 144 F.2d 106 (10th Cir. 1944).

B. After the case was at issue the defendants then made a second venue motion by which they sought to have the case transferred to Nevada as a more convenient forum for trial. If we assume this matter was the subject of the specification, the motion was then rested upon 28

Defendants vigorously contend the district court erred in denying *motions (grounded upon an asserted lack of equity* in plaintiff's complaint) *to dismiss the action and for summary judgment.* They rely upon the well settled rule announced in cases such as *Di Giovanni v. Camden Fire Insurance Association,* 296 U.S. 64, 68 (1935) and *Massachusetts Bonding & Insurance Co. v. Anderegg,* 83 F.2d 623 (9th Cir. 1936), *cert. denied,* 299 U.S. 567 (1936) that *when,* as here, *the loss has already occurred, a court of equity will generally not entertain a suit by an insurer to rescind the insurance contract* but will leave the matter to a court of law where an adequate remedy exists.

But in the circumstances of this case, the point is really of academic interest only. For after making the rulings and before trial the *district court plainly advised the defendants that the claim would be treated as one for a declaratory judgment* and that pursuant to their demand, reflected in the pretrial order, the issue of liability would be submitted to a jury for determination. This was done.[2]

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[2]Confirmation, if such is needed, appears in the judgment. There, these statements appear:

> "The above entitled cause came on regularly for trial in the above entitled Court on the 15th day of December, 1964, before a jury duly empaneled and sworn to try the matter at issue. Prior to the trial, the Court concluded that it should treat the claims on the validity of the insurance policy as an action for a declaratory judgment to adjudicate and declare the rights, if any, of the respective parties on the *segregated issue of the validity of the policy* and *whether the same should be cancelled and rescinded as demanded*

U.S.C. §1404(a) and of course was committed to the discretion of the trial judge. Clearly, his decision was correct. The principal witnesses were all in Oregon, the transaction had taken place there, the case was ready for trial, and the rational conclusion was that neither the convenience of witnesses nor the ends of justice would be advanced by transferring the case elsewhere.

Defendants made a related contention that the district court committed error by treating the plaintiff's action as one for a declaratory judgment. Their reasoning is far from clear; they assert variously in both opening and reply briefs that "the trial court could not enlarge its jurisdiction by treating appellee's amended complaint as a petition for declaratory judgment." None of the cases cited by defendants is remotely in point or in any way supports them. Typical is *Commercial Casualty Ins. Co. v. Fowles,* 154 F.2d 884 (9th Cir. 1946). There it appeared that plaintiff's suit had been dismissed in the district court for lack of jurisdiction; specifically that the amount in controversy was insufficient to meet the monetary requirements necessary to vest the federal court with jurisdiction under the diversity statute. On appeal the argument was made that the Federal Declaratory Judgment Act, under which the suit was brought, afforded an additional ground for jurisdiction of the Federal District Courts. We held simply that the Act was remedial in character and afforded a new remedy; that it did *not "enlarge" the federal* jurisdiction and that such jurisdiction must independently exist.

Plaintiff's complaint and the pretrial order *plainly*

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by plaintiff." [Here are set out recitals of the trial and submission and return of the verdict].

"Whereupon, said verdict was duly received and the court adopting the verdict of the said jury and finding that justiciable controversy existed between plaintiff and defendants on the issue of the validity of the alleged insurance policy . . . and the cause having been submitted to said jury as an action at law, rather than as a suit in equity, and being now fully advised in the premises,

Based on said verdict of the jury,

IT IS ORDERED. . . ."

We note that the court added that if on appeal we should decide the case ought to have been tried as one in equity then the court was in agreement with the verdict and would adopt it.

showed the existence of a justiciable controversy and hence a matter appropriate to settlement by declaratory judgment. True, plaintiff prayed for rescission, but this did not impair the court's power, inded its duty, to render such judgment as on the entire record the law required to finally determine the litigation. The principle, long since settled in federal courts, is embodied in the statement in Rule 54(c) that "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Contrary to the defendants' contention, the verdict is supported by substantial evidence. Thus the record contains proof to the effect that in 1958 the defendants (who were then living in Portland, Oregon) purchased from Chaney, a local insurance agent, a policy of fire insurance covering the Nevada buildings. That policy was written by the Standard Accident Insurance Company. Late in 1960 and shortly before Chaney joined the Larry C. Nelson Agency in Portland as an insurance solicitor, the policy *was cancelled*, thus leaving the defendants without insurance on the property.

In the summer of 1962, Mrs. Arley requested Chaney to once again place fire insurance on the Nevada property. Chaney assured her that he would take care of it but, because neither he nor the Nelson Agency had a non-resident Nevada license, he "would have to see what else [he] could do because it would probably have to

be brokered or [he] would have to take out another license."[3]

Chaney made no attempt to take out another license. Instead, during the summer of 1962, he approached several licensed agents with the proposal that one of them procure the policy.[4] Although he was unsuccessful he repeatedly reassured Mrs. Arley that he was diligently pursuing the matter. *On October* 30, 1962, *he "guaranteed" that he would obtain insurance.* On that date, and again in December 1962, *he made statements to the effect that "you are covered."*

On January 16, 1963, the day after the fire, Mrs. Arley notified Chaney of the loss. The following day, January 17, Chaney for the first time asked plaintiff to issue the policy. He did not inform plaintiff that the property had already been damaged; rather, he requested that the policy be back-dated to January 12, 1963. Plaintiff did not learn of the fire until after the policy had been issued.

On this evidence the jury was entitled to conclude, as plaintiff contended, that throughout this period *Chaney was acting as a broker for defendants and not as agent for the plaintiff.*[5] *In that relationship his statements to the defendants would neither bind nor obligate plaintiff*

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[3]Chaney *did not need such a license to cover out-of-state risks.* As United's agent, *he could at any time have orally bound United as insurer.* The problem was *that without such a license he would have lost his commission for,* under Nevada law, an insurance underwriter may pay a commission only to a nonresident agent who possesses a Nevada license.

[4]The inference is permissible and indeed strong that *he hoped one of them would "split" this commission with Chaney.*

[5]An insurance broker, as distinguished from an agent, does not represent an insurance company but places insurance with whatever company he can induce to insure the risk. He is not the agent of the insurer, but rather the agent of the one seeking insurance.

as the insurer of the defendants' property. And absent a valid binder prior to the fire, no contract of insurance would exist. For if Chaney was acting on behalf of the defendants when he submitted the application on January 17, 1963, the policy was voidable at the election of plaintiff by reason *of Chaney's fraudulent nondisclosure.* Similarly, even if on January 17, Chaney was acting as *plaintiff's agent,* the policy was likewise voidable because at that time it was *beyond his authority as such agent to commit his company to the insurance of the risk for the property was already damaged.* See *Gandelman v. Mercantile Insurance Co.,* 90 F. Supp. 472, 476 (S.D. Cal. 1950), *aff'd,* 187 F.2d 654 (9th Cir. 1951), *cert. denied,* 342 U.S. 896 (1951); *cf. Royal Insurance Co. v. Smith,* 77 F.2d 157, 159 (9th Cir. 1935), *cert. denied,* 303 U.S. 656 (1938). See generally 16 Appleman, *Insurance Law and Practice* §9163, at 703 (1944).

Defendants urge that as a matter of Oregon law Chaney was not their broker; rather he must be deemed the agent of plaintiff, the insurer.[6]

They trace the progression of the Oregon insurance laws from their inception noting that the original insurance act defined a broker but that the laws were *amended and superseded* so that presently the sole provision for brokers of any kind is for nonresident brokers. They also call attention to the fact that during this same transitional period the term "agent" received legislative attention; that although defined initially as one who solicited insurance and acted as a middleman to place insurance the present statute defines "agent" as a person lawfully

[6]As defendants' counsel stated: "There is no such animal as a broker under the statutes of Oregon."

authorized to act as representative of the insurer in negotiating and effecting contracts of insurance; and additionally they point out several presently existing statutes providing for insurance solicitors and defining them in substance as agents' agents.

Defendants then invoke the well settled aid to statutory construction that the mention of one thing implies the exclusion of another (*expressio unius est exclusio alterius*) and conclude that, since there is presently no provision for brokers or for licensing brokers except those who are non-resident, and that a solicitor is made a subagent of the insurance company whom the agent represents, that the legislative intent was to prohibit persons from being brokers (except those out-of-state licensed brokers) and to constitute them agents of the insurer. Such a construction is not permissible. The statutes are clearly *regulatory, not prohibitory in nature*. They uniformly provide for and require licensing. The most that can be concluded is that resident brokers need not be licensed.

There is an additional reason why the argument is unsound. Where two constructions are permissible, one of which *would invalidate* and the other save a statute, *the latter will be placed upon it*. Given the construction urged by defendants, grave doubts regarding the constitutional validity of the statute would exist. Under the statute as so construed, the State would permit a person residing beyond its territorial limits to carry on a business within its boundaries, but at the same time forbid its own citizens to do so. Absent some acceptable basis for classifying citizens differently than non-citizens, and we can see none, the discrimination would appear to be arbitrary.

Even if one of the instructions given by the court was erroneous in that it required specific proof of a fact in issue and did not allow the fact to be the subject of inference, defendants are in a poor position to complain; it appears that they requested an instruction in all essential respects the same, including the portion criticized, as the one given. A litigant may not simultaneously assign as error both the giving and failure to give the same instruction.

We have thoughtfully examined the several remaining assignments, but conclude they are so wholly lacking in merit that their discussion would serve only to unduly lengthen this opinion.[7]

The judgment is affirmed.

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[7]For example: Defendants assert that plaintiff was precluded by estoppel and waiver from questioning Chaney's authority as its agent by reason of a letter plaintiff sent to them shortly after the policy was issued. Defendants urge that this letter states as the sole ground for denying liability the defendants' asserted fraudulent non-disclosure of the loss prior to the application for the policy. However, the letter is not susceptible of such a limited construction; there was no basis to invoke the waiver doctrine because at the time the letter was written the *defendants had not yet asserted that they were covered by an oral binder from Chaney;* and no prejudice could result because any rights and obligations of the parties had already accrued.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED PACIFIC INSURANCE COMPANY, a Washington Corporation, *Plaintiff,* v. JACQUES ARLEY and CHARLOTTE ARLEY, husband and wife, *Defendants.*	ORDER DENYING MOTIONS FOR NEW TRIAL AND FOR JUDGMENT NOTWITHSTANDING VERDICT CIVIL No. 63-127

Throughout this proceeding, the defendants insisted that they were entitled to a jury trial. On a review of the issues created by the pre-trial order, I concluded that *plaintiff's contentions* were sufficiently broad to *permit the use of a jury on the theory that plaintiff was proceeding to secure a declaration of rights under the declaratory judgment statute.* 28 U.S.C. §2201. That such a declaration is proper when one party is challenging the liability of an insurance policy is well settled by the authorities. *Glens Falls Insurance Co. v. Satree,* 320 F.2d 92 (9th Cir. 1963); *Pacific Indemnity Co. v. McDonald,* 25 F. Supp. 522 (D.C. Or. 1938); *Hawkeye-Security Insurance Co. v. Schulte,* 302 F.2d 174 (7th Cir. 1962). That an actual or justiciable controversy existed between plaintiff and defendants is beyond argument. A suit for a declaratory judgment is neither wholly a suit in equity nor an action at law. It is a creature of statute and is *sui generis.* Its utilization does not *alter or invade the right to a trial by jury at common law. Hargrove v. American Century Insurance Co.,* 125 F.2d 225 (10th Cir. 1942); *Pacific Indemnity Co. v. McDonald,* 107 F.2d

446 (9th Cir. 1939). The contentions of the plaintiff and the contentions of the defendants, as outlined and presented in the pre-trial order, were such that the court could treat the cause as an action at law for a declaratory judgment on the controversy existing between the parties. *Sanders v. Louisville & N.R. Co.*, 144 F.2d 485 (6th Cir. 1944).

Since defendants insisted on a jury trial and were notified by the court some months prior to the trial that the issues of fact would be submitted to a jury, they are not now in a position to complain of the court's action in treating the proceeding as an action at law for a declaratory judgment and in submitting the issues of fact to a jury.

The other issues presented by the motions were raised by defendants at the time of trial and, in my opinion, are without merit.

Based on the proceedings in this cause, IT IS ORDERED AND ADJUDGED that defendants' motion for judgment notwithstanding the verdict and motion for a new trial be, and the same are hereby, denied.

DATED this 2nd day of February, 1965.

John F. Kilkenny, *District Judge*

APPENDIX C

INSTRUCTIONS OF THE COURT (RT 255-271)

Portland, Oregon
December 17, 1964.

(Court reconvened, pursuant to adjournment, at 9:30 a.m., and proceedings herein were resumed as follows:)

INSTRUCTIONS OF THE COURT

[The first three paragraphs of the instructions are preliminary statements as to the respective functions of judge and jury.]

Now I will outline the contentions of the parties here. Generally speaking, it is the plaintiff's contention, that is, the United Pacific Insurance Company, that at the time this application for insurance was made by Roger Chaney on the 16th of January he was acting as broker and agent for the defendants here in attempting to secure this insurance on this property rather than for the plaintiff, and that at the time of making this application to the plaintiff insurance company for this coverage he had knowledge that this property had already been destroyed by fire, and that he wilfully concealed and did not disclose the fact to the insurance company at the time the application for the insurance was made.

In other words, the plaintiff claims that Chaney under those conditions was acting as agent for the defendants and not as agent for the plaintiff.

On the other hand, the defendants here, first of all, deny this and say that is not the fact. They state, in substance, that the fact was that on either the 30th or

the 31st of October, 1962, Chaney, while acting within the scope of his authority as a solicitor—now, a solicitor is merely an agent, members of the jury, and he is called a solicitor so as to distinguish him under insurance law from a general agent, such as the Nelson Company—that he was a solicitor and agent of the Nelson Company, and that while acting within the scope and course of his authority he told Mrs. Arley that this property was covered by insurance; that the insurance company was the United Pacific Insurance Company, the plaintiff here; that the amount of insurance was fixed; and that the insurance was in effect as of that time.

Now this, of course, is denied by the plaintiff, that *there was* any coverage as of that date.

Those essentially are the issues which you are here to try.

[The next 6 paragraphs are unexceptionable instructions as to bias and prejudice, pertinent proof, number of witnesses, weighing the evidence, attitude of jury toward corporate defendant, and direct and circumstantial evidence.]

Now, the principal issue to be decided by you in this case under the issues as formulated is whether Chaney, who had been named as solicitor by the Nelson Company, was during Chaney's discussions with Mrs. Arley on the 30th or the 31st of October, 1962, acting for the defendants or was he acting for the plaintiff in the course and scope of his authority as a solicitor for Nelson? The fact that Chaney may have been named as a solicitor for the plaintiff is not in and of itself controlling. You must weigh all of the evidence in the case and determine there-

from whether Chaney was in truth and in fact acting as a broker attempting to secure insurance for the defendants, or was in truth and in fact acting for the plaintiff. If Chaney was acting for the defendants in procuring this insurance then your verdict must be for the plaintiff. When I say "in procuring this insurance," I mean if he was acting at the time he made this application on January the 16th as agent for the defendants, then your verdict must be for the plaintiff.

I have mentioned the word "agent" and I have mentioned the word "solicitor" in so far as that word is used in this case. They are essentially the same, except that a general agent here under the insurance law in this state is a company, such as the Nelson Company, and a solicitor is an agent of such a company. An agent is a person—I am speaking now of a solicitor agent—who, by virtue of and pursuant to an agreement with another, called the principal, undertakes to represent the principal in dealings with third persons, or undertakes to transact some other business, or to manage some affair or perform some service for the principal, whether for compensation or as a gratuity. The agreement may be oral, written, express or implied. An agent may be an agent for two persons or firms or persons and firms at the same time. The test by which to determine whether at a given time one person is the agent of another is to ascertain whether or not at that time the former was subject to the orders and control of the latter, and whether or not the latter had the right to control or the right to discharge the former for disobedience or misconduct, irrespective of whether the person was serving gratuitously or for compensation.

When an agent departs from the business or service

which has been assigned to him expressly or impliedly by his principal, and pursues some activity or object not for his principal and not reasonably embraced within his employment, but for the agent's own or another's pleasure or purpose, the principal is not responsible for anything done or not done in such activity.

It is not necessary that a specific act, or failure to act, be authorized as such by the principal to bring it within the scope of the agent's authority. It is within the scope of his authority if it is done while the agent is engaged in the transaction of business which has been assigned to him for attention by his principal, or while the agent is doing any reasonable thing which his contract of employment expressly or impliedly authorizes him to do and which may reasonably be said to have been contemplated by the contract as necessarily or probably incidental to such agency.

Now, if you find from a preponderance of the evidence that Chaney was the agent of the defendants in the attempt to procure this insurance, and failed to reveal to the United Pacific Insurance Company and wilfully concealed from the company the fact that the property had been damaged by fire prior to the written request to United Pacific Insurance Company for insurance on the property, then your verdict should be for the plaintiff, the United Pacific Insurance Company.

If, on the other hand, you find that Chaney, on or about October 30th or 31st, 1962, while acting within the scope of his authority with the Nelson Company, represented to the defendant Mrs. Arley that the buildings owned by the defendants near Verdi, Nevada, were cov-

ered by fire insurance and named the United Pacific Insurance Company as the fire insurance company that would issue the policy, and that the amount and date of the coverage was definite, and that the issuance of the policy here in question was the outgrowth of said representations, if any, then and in that event your verdict should be in favor of the defendants on the issues here presented.

On these questions, your attention is called to the admissions of Chaney and the testimony of Nelson to the effect that after the October conversation Chaney was told by Nelson that he did not have authority to write insurance in Nevada, and that Chaney attempted to place the insurance with other firms. This, of course, would have some bearing on whether Chaney made a definite commitment to Mrs. Arley to cover the property in the United Pacific Insurance Company for the sums mentioned on the 30th or 31st of October. Of course, as I have previously said, you are the sole judges of the facts, and you may entirely disregard any and all comments which I may make on the evidence.

If you find that there was nothing definite in connection with the October conversation, and you find that at the time the policy was applied for on January 16th, 1963 the property insured was already damaged and destroyed and was not in reality in existence, and that prior thereto Chaney had not informed Mrs. Arley that the property was covered in a specific amount in the United Pacific Insurance Company, then in that case also your verdict would have to be for the plaintiff.

[The next 5 paragraphs are unexceptionable instruc-

tions relating to credibility of witnesses and conduct of the jury in reaching a decision in the case.]

Forms of verdict have been provided. If you find that the insurance company is entitled to prevail, then your foreman should sign the verdict in favor of the plaintiff. On the other hand, if you find that the plaintiff is not entitled to prevail, then the foreman should sign the verdict in favor of the defendants.

[Three additional paragraphs follow advising the jury of proceedings between the court and counsel in chambers. The taking of exceptions and the discussion of exceptions with the court during R-264 to R-270 is omitted.]

THE COURT: Members of the jury, my attention has been called to the fact that during the course of the instructions I mentioned a "broker." In fact, of course, I intended to speak of an agent. So wherever I mentioned "broker" during the course of the instructions you will consider that I was speaking of an agent. That was the intention of the Court. And when I was speaking of the man Chaney, if I referred to him as a "broker" it should have been as an "agent."

Now, members of the jury, you may retire. The Bailiff will follow you with the exhibits, and the verdicts will be along in due course.

When you have reached a verdict, notify the Court. We will be in session here most of the day.

APPENDIX D

General Laws of Oregon (now included in Oregon Revised Statutes, §§750.210-270)

CHAPTER 79

AN ACT

To provide for the licensing of nonresident brokers of insurance in the state of Oregon.

Be It Enacted by the People of the State of Oregon.

Section 1. A nonresident insurance broker, within the meaning of this act, shall be any person, firm or corporation not a resident or residents of the state of Oregon, other than an insurance or surety company or society, or officer of such company or society, or employe compensated by salary only and acting on behalf of such company or society, or a medical examiner for a life insurance company or society, who, for compensation, acts or aids in any manner in negotiating contracts of insurance or indemnity or surety bonds or reinsurance or placing risks, or effecting insurance or reinsurance for a party other than himself.

Section 2. No person, firm or corporation shall, within the state of Oregon, act as an insurance broker, unless such person, firm or corporation is a regularly qualified and licensed broker or agent of another state, and until such person, firm or corporation shall have first obtained a license from the insurance commissioner of the state of Oregon authorizing him or it so to act.

Section 3. The insurance commissioner may, upon the payment of a license fee of one hundred dollars ($100),

issue to any qualified person, firm or corporation, resident in any other state, who is a licensed broker or agent of such state, a license to act as an insurance broker to negotiate contracts of insurance or reinsurance or place risks or surety bonds or effect insurance or reinsurance with any qualified domestic insurance company or its agent or with the authorized agent in the state of Oregon of any foreign insurance company duly admitted to do business in this state and which has complied with all requirements of the insurance department, and not otherwise, upon the following conditions.

General Laws of Oregon, 1917, Chap. 203 (now included in or replaced by Oregon Revised Statutes §736.005(3)(e) and (f))

Section 4-a. *The Word "Agent" in This Act.* (1) The word "agent" in this Act, wherever used, shall be construed to include and apply to a person, firm or corporation, and any certificate issued by the Insurance Commissioner to any person, firm or corporation shall be issued only to a resident of this State and shall bear upon its face the name of each and every individual member comprising such firm and the names of the principal officers of such corporation; and any person who solicits insurance, receives an application or order to write, renew or procure any policy or collect any premium, or who attempts as middleman to place any insurance in this State shall be deemed an insurance agent, and shall comply with the provisions herein; and if such agent shall refuse or neglect to procure a certificate as provided herein before transacting business as such agent he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than $50.00 for each offense and

in default of payment of the fine shall be imprisoned in the county jail not more than fifteen days; *provided, however,* that the provisions of this paragraph shall not apply to the regularly employed office employes receiving a salary only from companies or agents or to agents of life insurance companies.

(4) No person shall act as agent for any company in soliciting or placing insurance or aid in soliciting or placing insurance, unless the company shall have a license to transact such business, nor unless such agent has an unexpired, unrevoked certificate of his authority issued by the Commissioner.

Oregon Laws, 1943 Chap. 445
(now included in Oregon Revised Statutes, §736.005(3)(e) and (f))

Section 1. That section 101-102, O.C.L.A., be and the same hereby is amended so as to read as follows:

Sec. 101-102. 1. This act shall be known as the "Insurance Law." All insurance companies and associations now or hereafter incorporated or formed by authority of any general or special law of this state and all foreign and alien companies licensed to do business in this state shall be subject to this act.

6. The words "insurance agent" or "agent," in this act, wherever used, shall mean a person authorized in writing by any insurance company lawfully authorized to transact business in this state to act as its representative, with authority to solicit, negotiate and effect contracts of insurance in its behalf, or any member of a copartnership or association, or any stockholder, officer or agent of a corporation so authorized and permitted by law to solicit, negotiate and effect contracts of insurance.

7. The words "insurance solicitor" or "solicitor," in this act, wherever used, shall mean an individual authorized by a duly licensed insurance agent to solicit contracts of insurance solely on behalf of such agent.

Sec. 101-113. 1. No person shall, either directly or indirectly, represent himself to be the agent of any insurance company, or the solicitor for any agent, or act as agent for any company or solicitor for any agent in soliciting, negotiating or effecting in this state any contract of insurance or renewal thereof, or aid in soliciting or placing any contract of insurance or renewal thereof unless the company shall have a license to transact such business, or unless such person has an unexpired, unrevoked certificate of his authority issued by the commissioner.

Oregon Laws, 1947 Chap. 373
(now Oregon Revised Statutes §736.445)

Sec. 101-113. 1. No person, either directly or indirectly, shall represent himself to be the agent of any insurance company, or the solicitor for any agent, or act as agent for any company or solicitor for any agent in soliciting, negotiating or effecting in this state any contract of insurance or renewal thereof, or aid in soliciting or placing any contract of insurance or renewal thereof unless the company shall have a license to transact such business, or unless such person has an unexpired, unrevoked certificate of his authority issued by the commissioner.

Oregon Revised Statutes

736.005 Definitions: (3) When used in the General Insurance Law, unless the context otherwise requires:

(e) "Insurance agent" or "agent" means a person au-

thorized in writing by any insurance company lawfully authorized to transact business in this state to act as its representative, with authority to solicit, negotiate and effect contracts of insurance in its behalf, or any member of a copartnership or association, or any stockholder, officer or agent of a corporation so authorized and permitted by law to solicit, negotiate and effect contracts of insurance.

(f) "Insurance solicitor" or "solicitor" means an individual authorized by a duly licensed insurance agent to solicit contracts of insurance solely on behalf of such agent. [Amended by 1959 c.323 §8; 1963 c.580 §91]

736.425 Who may be licensed; contents of license; power of licensed agent to bind company. (1) *No license shall be issued by the commissioner to any person except an insurance agent or insurance solicitor as defined in ORS* 736.005. A license shall state whether the holder is an insurance agent or insurance solicitor and what company the *agent is authorized* to represent and by what agent the solicitor is employed. It shall designate the class of insurance covered by the license.

(2) No agent shall have authority to represent or bind any insurance company except a company for which he holds an agency appointment and license duly issued as required by ORS 736.405 to 736.425. [Amended by 1965 c.610 §9]

736.430 Compensating unlicensed agent for soliciting forbidden. (1) No insurance company, or agent, or solicitor, shall pay any money or commission or give or allow any valuable consideration, except regular salaries to salaried employes, or compensation to supervising general agents, of any insurance company lawfully authorized

to transact business in this state or except with respect to reinsurance, to any person not an agent duly licensed under ORS 736.405 to 736.425, for or because of soliciting insurance, receiving an application or order to write, renew or procure any policy or collect any premium or attempting as middleman to place any insurance or negotiating or effecting in this state a contract of insurance on any property or insurable business activities or interest located within or transacted with this state.

736.440 Acting as agent or solicitor without license a crime; exclusions. No agent or solicitor shall refuse or neglect to procure a license, as provided in ORS 736.405 to 736.425, before transacting business as an agent or solicitor. This section shall not apply to regularly employed office employes of companies or agents, receiving a salary only, as to business transacted at the office of such company or agent. Nor shall this section be construed to prevent the licensing of nonresident life insurance agents.

736.445 Writing or soliciting insurance for unlicensed company or agent forbidden. No person, either directly or indirectly, shall represent himself to be the agent of any insurance company not licensed to transact such business, or the solicitor for any agent not having an unexpired, unrevoked license issued by the commissioner, or act as agent for any such company or as solicitor for any such agent, in soliciting, negotiating or effecting in this state any contract of insurance or renewal thereof, or aid in soliciting or placing any contract of insurance or renewal thereof.

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In the Supreme Court
of the United States

OCTOBER TERM, 1967
No. 972

JACQUES ARLEY and
CHARLOTTE ARLEY,
Petitioners,

v.

UNITED PACIFIC INSURANCE COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT UNITED PACIFIC INSURANCE COMPANY IN OPPOSITION

KENNETH E. ROBERTS
12th Floor, Standard Plaza
Portland, Oregon 97204
Attorney for Respondent United Pacific Insurance Company

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-68

SUBJECT INDEX

	Page
Citations to the Opinion Below	1
Questions Presented	2
Statutes Involved	2
Statement	2
Reasons for Denying the Writ:	
Introduction	7
I—The Federal District Court correctly decided all issues of law in compliance with Oregon Jurisprudence	7
II—The Federal District Court and the Ninth Circuit adhered to customary, recognized judicial procedure	15
Conclusion	18

TABLE OF AUTHORITIES

Page

TABLE OF CASES

Alliance Insurance Co. v. Continental Gin Co., 285 S.W. 257 (Tex. Comm. App. 1926) 13

American Fire Insurance Company v. King Lumber and Manufacturing, 250 U.S. 2, 39 S. Ct. 431, 63. L. Ed. 810 (1919) 14

Celina Mutual Casualty Company v. Baldridge, 313 Ind. 198, 10 N.E.2d 904 (1937) 12

Clark v. Insurance Company of North America, 89 Me. 26, 35 A. 1008 (1889) 13

Di Giovanni v. Camden Fire Insurance Association, 296 U.S. 64, 56 S. Ct. 1, 80 L. Ed. 47 (1935) 17

Enlow v. New York Life Insurance Company, 293 U.S. 379, 55 S. Ct. 310 (1935) 17

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 15, 17

Ernest v. State, 40 Ala. App. 344, 113 So. 2d 517 (1959) 13

Gambleman v. Mercantile Insurance Company of America, 90 F. Supp. 472 (S.D. Cal. 1950) 12

Hamacher v. Tumy, 222 Or. 341, 347, 352 P.2d 473, 496 (1960) 11

Hardwick v. State Insurance Company, 20 Or. 547, 26 P. 840 (1891) 12

Hopkins v. Phoenix Fire Insurance Company, 200 Ky. 365, 254 S.W. 1041 (1923) 12

In re Midland United Company, 141 F.2d 692 (3rd Cir. 1942) 17

Mock, et al v. Glens Falls Indemnity Co., 210 Or. 71, 80, 309 P.2d 180 (1957) 9, 13

Price v. Greenway, 167 F.2d 196 (3d Cir. 1948) 16

TABLE OF AUTHORITIES (Cont.)

Page

Rodgers Insurance Agency v. Anderson Machinery, 211 Or. 459, 468, 316 P.2d 497, 501 (1957) 11

Royal Insurance Company, Ltd. v. Smith, 77 F.2d 157 (9th Cir. 1935) 13

Russell v. Cunningham, 233 F.2d 806 (9th Cir. 1956) 17

Salquist v. Oregon Fire Relief Association, 100 Or. 416, 197 P. 312 (1921) 9

Seideman v. Hamilton, 173 F. Supp. 64 (D. Pa. 1959) 16

Sholund v. Detroit Fire & Marine Insurance Co., 172 Wash. 111, 19 P.2d 395 (1933) 13

United States Casualty Co. v. Rodriques, 288 S.W. 487 (Tex. Civ. App. 1926) 12, 13

Waterloo Lumber Company v. Des Moines Insurance Co., 158 Iowa 563, 138 N.W. 504, 506 (1912) 12

STATUTES

ORS Ch. 28 16
ORS 736.005(3)(e)(f) 2, 14
ORS 736.405 ..... 2, 19, 20, 21
ORS 736.410 ..... 2, 14, 21, 22

NRS 684.020 (4) 11
NRS 684.350 11

OTHER AUTHORITIES

16 Appleman, Insurance Law and Practice 703, § 9163 12

Restatement, Conflict of Laws § 7 (1934) 16

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v.

UNITED PACIFIC INSURANCE COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT UNITED PACIFIC INSURANCE COMPANY IN OPPOSITION

Respondent, UNITED PACIFIC INSURANCE COMPANY, opposing the issuance of a writ of certiorari, prays for denial of the petition.

CITATIONS TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is properly reported at

379 F.2d 183 (9th Cir. 1967). Petitioners' statement of jurisdiction is sufficiently accurate to be acceptable.

QUESTION PRESENTED

Whether a fact question is presented on agency for jury determination when it is asserted that a solicitor for a local agent has orally bound a fire risk in the Fall, and the solicitor does not request the issuance of the policy until after the loss in January: whether a jury question is presented on whether an insurance solicitor is an agent for a prospective insured or for an insurance company.

STATUTES INVOLVED

The only statutes involved in this action are ORS 736.005 (3) (e), (f); 736.405 and 736.410. Petitioners' Brief A-22 contains ORS 736.005 (3) (e), (f); ORS 736.405, 736.410 appear in Appendix A, supra.

STATEMENT

Petitioners' statement presents less than a complete picture and lends no weight to the findings of the jury, which were contrary to the petitioners. The Honorable John F. Kilkenny, had the petitioners not been entitled to a jury trial, would have reached an identical result (Pet. Br. 7). All conflicts in the evidence must be posited as determined adversely to petitioners by the jury.

Petitioners are husband and wife, married in 1954 (Tr. 245); petitioners owned real property near Verdi, Nevada, which was damaged by fire on January 15, 1962 (R. 53, 54). Petitioners have resided in Oregon since 1958, Mr. Arley being employed by the Montag Furnace Company in Portland (Tr. 179, 180). Mr. Arley maintained a bank account with the First National Bank of Oregon (Tr. 180), and both petitioners' cars were registered in Oregon (Tr. 180).

Mr. and Mrs. Arley became acquainted with Mr. Roger Chaney sometime in the year 1958; thereafter they obtained some of their insurance policies through him (Tr. 217). At that time, Mr. Chaney operated his own independent insurance agency and acted as agent for Insurance Company of Oregon, Standard Accident and Ohio Casualty (Tr. 59). Petitioners obtained a fire policy on the Nevada property from Mr. Chaney, which was underwritten by Standard Accident Insurance Company, effective January 28, 1958, for a period of three years. This policy was cancelled in November, 1960 (Tr. 183). From 1960 until the time of the present action, there was no insurance upon the Nevada property (Tr. 184). During this time, the petitioners had considered employing agents in Reno to secure the coverage (Tr. 184).

In 1961, Mr. Chaney's business was purchased by Larry Nelson Agency and Mr. Chaney became a solicitor for that firm (Tr. 12). The Nelson Agency represented various companies, including Insurance Company of Oregon, Western Fire of Fort Worth,

United Pacific Insurance Company (respondent) and Ohio Casualty Company (Tr. 9). The Nelson Agency did *not* take over the fire policy on the Nevada property belonging to petitioners (Tr. 12).

In mid-1962, Mr. Chaney had various conversations with Mrs. Arley (an attorney), concerning the placing of fire coverage upon the Nevada property (Tr. 66, 73, 89). Mr. Nelson advised Mr. Chaney that he could not place the coverage through the Larry Nelson Agency because the agency did not have a Nevada license (Tr. 13, 70, 121). Mr. Chaney then told Mrs. Arley that he lacked a Nevada license but that he would attempt to *broker* the insurance for her (Tr. 105). Mr. Chaney told Mrs. Arley that he would take care of the coverage, but he did not recall ever advising her of any particular company (Tr. 68, 80, 81, 90). Subsequently, Mr. Chaney made inquiry as to how he might place the insurance and share in the commission, and he called other agents and brokers regarding placing the coverage (Tr. 70, 71, 124).

On the morning of January 16, 1963, Mrs. Arley called Mr. Chaney and advised him that there had been a fire loss on the Nevada property; she inquired as to whether or not Mr. Chaney had placed insurance upon it (Tr. 73). Later that day, Mr. Chaney called Mrs. Arley back and advised her that he had placed fire insurance upon the property (Tr. 74). *In fact, Mr. Chaney had not placed insurance on the property* (Tr. 72, 73, 74, 75).

Subsequent to being advised of the loss on January 17, 1963, *Mr. Chaney submitted an application for insurance to the United Pacific Insurance Company, respondent herein. The application did not indicate in any manner that the property had been previously damaged by fire* (Tr. 76).

Thereafter, sometime in March, 1963, *petitioners received respondent's policy No. F-*78185. *At the time the policy was processed, the respondent's employees handling the application had absolutely no knowledge that the petitioners' property had been earlier destroyed by fire* (Tr. 131, 143, 151, 202). *Respondent would not have processed the application had it known of the loss* (Tr. 202).

Subsequently, on March 5, 1963, Mr. Chaney, without the knowledge of respondent, contacted Mr. Marks of General Adjustment Bureau in Reno, Nevada, to inspect the damaged premises (Tr. 167, 177).

On April 2, 1963, United Pacific Insurance Company wrote petitioners denying coverage (Pl. Ex. 56).

On April 4, 1963, *United Pacific Insurance Company filed its complaint in the United States District Court for the District of Oregon to cancel and rescind the policy* (R. 1-4), *alleging that petitioners had failed to disclose at the time of issuance that the property had been seriously damaged by fire.*

Three months later, on July 5, 1963, petitioners filed an action at law on the policy in the Second

Judicial District Court of the State of Nevada (R. 30), which action was removed to the United States District Court for the District of Nevada. On April 13, 1964, the Nevada District Court entered an order granting a stay of proceedings because of the pendency of the earlier Oregon action (R. 42).

Petitioners continued to demand a jury trial in the Oregon action; their wish was granted, a jury trial was had, and judgment was entered on the jury verdict in favor of respondent and against petitioners.

Thereafter, petitioners appealed to the United States Court of Appeals for the Ninth Circuit; the District Court judgment was affirmed by that body on June 9, 1967, and a petition for rehearing was denied August 1, 1967 (Br. 2).

Petitioners' instant appeal (Ninth Circuit No. 20099) was not the first encounter between these parties, on the instant facts, in that tribunal. Petitioners filed *three additional interim appeals* to the United States Court of Appeals for the Ninth Circuit: Ninth Circuit Nos. 19101, 19320 and 19323. Each of these petitions were dismissed by the Ninth Circuit.

REASONS FOR DENYING THE WRIT

Introduction

Petitioners' search for a writ of certiorari is one more step in a calculated plan of harassment of respondent. Petitioners present no valid reason for granting the writ.

Time and space permit no line-by-line refutation of the lengthy petition. Apparently petitioners did not benefit from the counsel of the Ninth Circuit regarding "extravagant multipication of assignments" and irrelevant argument and citation (See e.g., Pet. Br. A-2, A-3). Time will not warrant respondent's rebutting each assertion in petitioners' voluminous document.

I

The Federal District Court Correctly Decided all Issues of Law in Compliance with Oregon Jurisprudence

The Court instructed the jury, *inter alia*:

"Now I will outline the contentions of the parties here. Generally speaking, it is the plaintiff's contention, that is, the United Pacific Insurance Company, that at the time this application for insurance was made by Roger Chaney on the 16th of January he was acting as broker and agent for the defendants here in attempting to secure this insurance on this property rather than for the plaintiff, and that at the time of making this application to the plaintiff insurance company for this coverage he had knowledge that

this property had already been destroyed by fire, and that he wilfully concealed and did not disclose the fact to the insurance company at the time the application for the insurance was made.

"In other words, the plaintiff claims that Chaney under those conditions was acting as agent for the defendants and not as agent for the plaintiff.

"On the other hand, the defendants here, first of all, deny this and say that is not the fact. They state, in substance, that the fact was that on either the 30th or the 31st of October, 1962, Chaney, while acting within the scope of his authority as a solicitor—now, a solicitor is merely an agent, members of the jury, and he is called a solicitor so as to distinguish him under insurance law from a general agent, such as the Nelson Company—that he was a solicitor and agent of the Nelson Company, and that while acting within the scope and course of his authority he told Mrs. Arley that this property was covered by insurance; that the insurance company was the United Pacific Insurance Company, the plaintiff here; that the amount of insurance was fixed; and that the insurance was in effect as of that time.

"Now this, of course, is denied by the plaintiff, that there was any coverage as of that date."

The jury returned a verdict in favor of respondent and against petitioners upon questions of fact which affect no parties *aluinde* this action. While it is not unusual for parties to assert in some guise that they have been denied a right to trial by jury,

THIS IS THE FIRST INSTANCE WHERE PETITIONERS APPEAR TO BE COMPLAINING BECAUSE THEY *WERE* GRANTED THEIR JURY TRIAL.

Petitioners requested a jury trial (see e.g. Pet. Br. App. B. A-11); and they may not be heard to complain at this late date.

The petitioners were favored by the District Court instruction and cannot now complain. No recovery is permitted in Oregon upon an oral contract of fire insurance. *Salquist* v. *Oregon Fire Relief Association*, 100 Or. 416, 197 P. 312 (1921); *Mock, et al* v. *Glens Falls Indemnity Co.*, 210 Or. 71, 80, 309 P.2d 180 (1957). Nevertheless, the District Court submitted the issue to jury on the theory that they might find, under the evidence, that Mr. Chaney represented respondent in October, 1962, and that the policy issued subsequent to the fire loss was confirmation of the oral binder. The jury found for respondent. It is difficult to comprehend how petitioners have been harmed.

Petitioners apparently desire this Court to try fact questions *de novo* and overrule the jury verdict. There was ample evidence to support the verdict, pursuant to the appropriate instructions (Tr. 258-261).

At the time Mr. Chaney first handled insurance matters for petitioners, he was in no way connected with United Pacific Insurance Company (Tr. 59); the earlier coverage he obtained for the Arleys was

through companies other than respondent (Tr. 61, 62).

At the time of the dealings in question, Mr. Chaney had disposed of his own insurance agency, and was employed as a *solicitor* by the Larry Nelson Agency; Mr. Chaney's employer, Mr. Nelson, had specifically instructed Mr. Chaney that he could not write the coverage requested by the Arleys (Tr. 13, 70).

Mr. Chaney and the Nelson Agency represented many companies other than United Pacific (Tr. 9).

After the conversations between Mr. Chaney and the Arleys in 1962, Mr. Chaney attempted to broker the insurance coverage through other sources (Tr. 13, 70, 71, 124).[1] Mr. Chaney advised Mrs. Arley that he did not have a Nevada license and that he would attempt to broker the insurance for her (Tr. 105).

Mr. Chaney did not recall ever advising Mrs. Arley of the name of any particular company in which he would attempt to write the coverage (Tr. 68, 80, 81, 90). While this fact was disputed by Mrs. Arley, *it was a jury question determined adversely to petitioners.* Petitioners' statements throughout their

---

[1] An independent witness, Mr. John Smith, testified (Tr. 124) that Mr. Chaney had asked him if he could broker the fire coverage for him on the Nevada property; such testimony clearly established the fact that Mr. Chaney was not acting on behalf of respondent, but in fact was attempting to broker coverage through other companies on behalf of petitioners.

brief are patently unfair insofar as they fail to give any weight to the contested evidence where the jury found in respondent's favor.

Oregon has long held that a local insurance agent or a solicitor may act as an agent or broker on behalf of an insured. The thrust of the petition ignores this plain rule. For example, see *Hamacher* v. *Tumy*, 222 Or. 341, 347, 352 P.2d 493, 496 (1960); *Rodgers Insurance Agency* v. *Anderson Machinery*, 211 Or. 459, 468, 316 P.2d 497, 501 (1957). This rule applies even in the absence of specific statutory provisions for licensing brokers; such employment is merely a common-law principal and agent arrangement, with the insurance agent or solicitor acting as the insured's agent.

This proposition is hardly unique and is certainly consistent with the Nevada statutes, which provide that a policy may be negotiated by a nonresident-licensed agent or broker. NRS 684.350, 684.020(4). Never, when writing for United Pacific Insurance Company, had Mr. Chaney written insurance on Nevada properties without a Nevada license (Tr. 114-116). The issue is not whether or not an agent licensed in Oregon may write insurance on non-Oregon property. *The inquiry is whether or not a person so procuring insurance is acting as the agent of the company or as a broker for the insured.* The fact that Mr. Chaney and Mr. Nelson did not hold a nonresident agent's or broker's license in Nevada for United Pacific Insurance Company is evidence that Mr.

Chaney acted on behalf of the petitioners. The question of agency is a fact question for the jury. *Hardwick* v. *State Insurance Co.*, 20 Or. 547, 26 P. 840 (1891).

No contract of insurance was entered prior to the occurrence of the fire, so any policy subsequently issued, even if antedated, was void. The facts were undisputed that a fire loss occurred on January 16, 1963 (R. 54), and that Mrs. Arley knew of the loss and notified Mr. Chaney (Tr. 73). Mr. Chaney, with this knowledge, then attempted to effect antedated fire coverage to January 12, 1963, by ordering a policy from respondent (Tr. 76). Respondent had absolutely no liability under the alleged contract which was void *ab initio*. (It was not a renewal of an existing policy).

An agent has no authority to attempt to effect insurance upon property already destroyed, and a fire policy written after a loss is not a valid insurance contract. See *Gambleman* v. *Mercantile Insurance Company of America*. 90 F. Supp. 472 (S.D. Cal. 1950); *Celina Mutual Casualty Co.* v. *Baldridge*, 313 Ind. 198, 10 N.E.2d 904 (1937); *Hopkins* v. *Phoenix Fire Insurance Company*, 200 Ky. 365, 254 S.W. 1041 (1923). An agent of an insurer has no authority to bind the insurer by attempting to insure destroyed property. 16 Appleman, *Insurance Law and Practice* 703, § 9163; *Waterloo Lumber Company* v. *Des Moines Insurance Company*, 158 Iowa 563, 138 N.W. 504 (1912). See also *United*

States Casualty Co. v. *Rodrigues*, 288 S.W. 487 (Tex. Civ. App. 1926); *Clark* v. *Insurance Company of North America*, 89 Me. 26, 35 A. 1008 (1896); *Alliance Insurance Co.* v. *Continental Gin Co.*, 285 S.W. 257 (Tex. Comm. App. 1926); *Sholund* v. *Detroit Fire & Marine Insurance Co.*, 172 Wash. 111, 19 P.2d 395 (1933); *Royal Insurance Co., Ltd.* v. *Smith*, 77 F.2d 157 (9th Cir. 1935); *Ernest* v. *State*, 40 Ala. App. 344, 133 So. 2d 517 (1959).

Therefore, since there was no prior contract of insurance between the Arleys and respondent, no valid contract of insurance could have been entered subsequent to the fire loss.

Petitioners cite numerous inapposite cases and statutory provisions in support of their petition. Considerable reliance is placed upon *Mock, et al* v. *Glens Falls Indemnity Co.*, supra. It is to be noticed that the *Mock* court *found as a fact* that the agent intended to bind Glens Falls; apparently the agent only wrote for the single company. For that reason, the policy was reformed, 210 Or. at 80. Furthermore, in *Mock*, the company eventually covered the risk, 210 Or. at 81, whereas respondent could never cover petitioners' risk since the property had been previously destroyed.

Referring to the second beginning paragraph of Petitioners' Brief (Br. 6)) there is no stipulation or agreement that a solicitor and agent of United Pacific told Mrs. Arley that she was covered in United Pacific prior to the loss. The facts, determined by

the jury, are contrary. Mr. Chaney testified that he recalled no mention of a particular company. Mr. Chaney wrote for the Larry Nelson Agency, which in turn wrote insurance for several companies, including respondent. *Any facts with which the Arleys quarrel were found adversely to them.* Moreover, the solicitor binds *his principal, the agent,* according to the statute, ORS 736.005(3)(f); 736.410 (App. A). Thus the first sentence is fallacious and the terminology "sub-agent solicitor" is an unsupported legal conclusion. The fact question of whether or not Mr. Chaney was the agent for petitioners or respondent was decided favorably to respondent.

Respondent is unimpressed with petitioners' unwieldly summary of portions of the Oregon Insurance Law (Pet. Br. 8, et seq.), and is unable to find that *American Fire Insurance Company* v. *King Lumber and Manufacturing Company,* 250 U.S. 2, 39 S. Ct. 431, 63 L. Ed. 810 (1919), supports petitioners' statement. The enactment of a comprehensive code was intended, *inter alia,* to protect against false and fallacious claims. The cost of these claims are eventually borne by the premium-paying public.

The "intolerable judicial legislation" (Br. 11) is a figment of petitioners' imagination. The Federal District Court and the Ninth Circuit Court of Appeals correctly applied Oregon law and a jury determined the facts. Oregon's insurance statute is not "destroyed" by the decision and petitioners' sole objective is to have a rehearing on a fact question by

this Court. All that can be said for petitioners' position is that petitioners are outraged at the jury verdict and they want another chance. Neither the Ninth Circuit nor the District Court departed from normal procedures and no other parties are affected by the judgment.

To paraphrase petitioners' argument (Br. 13), not every litigant is in a position to harass insurance companies through a multitude of vexatious appeals. Despite the fact that petitioners have argued the merits of their case on this appeal, contrary to the accepted practice of this Court, respondent suggests that this tribunal should summarily dismiss the petition.

II

The Federal District Court and the Ninth Circuit Adhered to Customary, Recognized Judicial Procedure

Petitioners' second reason (Br. 13-18) is as frivolous as petitioners' earlier appeals. Apparently petitioners are not familiar with an action for declaratory judgment, the Federal Rules of Civil Procedure, or *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Having requested and received a jury trial, petitioners received their day in court and are entitled to nothing more.

It hardly requires citation of authority to establish that a declaratory judgment proceeding is a per-

missible and customary practice in Federal District Court and, in fact, in the Oregon state courts. See ORS Chap. 28.

The instructions of the Court clearly presented the issues for the jury to determine; no rights were denied petitioners and since oral contracts of fire insurance are not recognized in Oregon, no error prejudicing petitioners was committed. Petitioners can only lamely contend that they should have pursued a law action in Nevada. But they suffered no deprivation of right—they received, in essence, a law action with jury trial in Oregon, the situs of the first action.

Oregon was a proper forum. The action was first commenced in Oregon by respondent. Since 1958, the Arleys have resided in Portland, Oregon (Tr. 179) and Mr. Arley was employed in that city by the Montag Furnace Company (Tr. 180). Petitioners' automobiles were licensed in Oregon (Tr. 180) and Mr. Arley maintained a bank account in Portland (Tr. 181). Citizenship for purposes of diversity means domicile. *Seideman* v. *Hamilton*, 173 F. Supp. 641 (D. Pa. 1959). The domicile of the wife is normally that of the husband. *Seideman* v. *Hamilton*, supra; *Price* v. *Greenway*, 167 F.2d 196 (3rd Cir. 1948); Restatement, *Conflict of Laws* § 7 (1934).

Declaratory judgment procedure is *sui generis*. In compliance with the petitioners' demands, the trial court permitted a jury trial on all issues of fact. Petitioners now complain because the jury did not find

in their favor. The Court properly exercised its discretion in retaining jurisdiction in Oregon where the controversy was first litigated. This Court should not disturb such sound exercise of discretion. The principal parties, Mr. and Mrs. Arley, and the principal witnesses, Mr. Chaney, Mr. Nelson, Mr. John Smith, Mrs. Linda Upton, Mr. Robert Mohlere, and Mr. A. D. Reinhardt resided in the District of Oregon. Other than being the situs of the fire, Nevada had no nexus with the incident.

Petitioners persist in citing such cases as *Di Giovanni* v. *Camden Fire Insurance Association*, 296 U.S. 64, 56 S. Ct. 1, 80 L. Ed. 47 (1935), and *Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379, 55 S. Ct. 310 (1935). (See, e.g., Br. 16). These decisions do not assist petitioners. Insofar as they are *rendered prior* to the decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), and the enactment of the Federal Rules of Civil Procedure, they are outmoded. Apparently they are premised upon some "federal equity common law." The petitioners received substantial justice and the decision below should not be disturbed.

Because of the vexatious and harassing tactics of petitioners, respondent should be awarded costs and attorneys' fees on this appeal, under the authority of *In re Midland United Co.*, 141 F.2d 692 (3rd Cir. 1944), and *Russell* v. *Cunningham*, 233 F.2d 806 (9th Cir. 1956).

CONCLUSION

The petition for writ of certiorari should be denied and judgment should be entered for a reasonable attorneys' fee in favor of the respondent.

Respectfully submitted,

KENNETH E. ROBERTS
Standard Plaza,
Portland, Oregon 97204
Of Attorneys for Respondent
United Pacific Insurance
Company

APPENDIX "A"

736.405 *Certification of agents by companies; licensing by commissioner; fee.* (1) Any company duly authorized and licensed to transact insurance business in this state, and lawfully doing such business herein, in respect thereof may contract with and appoint as its agent or agents in each city, town or village in this state any person or persons who hold or have qualified for an agent's license under the provisions of ORS 736-.405 to 736.425. Appointment shall be made by filing with the commissioner a certificate showing the name and address of the agent and the classes of business he is authorized to transact for the company. The agent shall at all times keep the commissioner informed of his current address. The commissioner, if he finds the agent qualified, thereupon shall issue to such agent a license to act for the company appointing him for the balance of the current year ending March 31 following the date of such appointment. No such license shall be issued to a firm or corporation unless it appears that it has an office in this state managed by an individual who is qualified in accordance with subsection (2) of ORS 736-.427. The firm or corporation shall at all times maintain such an individual as the manager of such office.

(2) In the event of the death, disability or refusal to act of an insurance agent holding a certificate of authority from any insurance company where no other insurance agent in the agency, copartnership, association or corporation is authorized to represent such insurance company,

the company may appoint another person, and the commissioner may issue a license to such other person, enabling him to represent such insurance company, upon an application being made in conformity with ORS 736.415. Such license shall continue only until the licensee is afforded an opportunity of taking the examination provided for in ORS 736.420 but not to exceed a period of six months. Any person to whom is issued such license and who fails to pass the examination shall not be entitled to the return of any fees previously paid.

(3) Every license for each agent representing any company shall be renewed during the month of March in each year for the ensuing year upon proper application to the commissioner by the company appointing him. Renewal of an agent's license may be accomplished by the continuance of the existing license for the ensuing year upon proper application by the appointing company. The fee for issuing or renewing such license shall be as provided in ORS 736.130 and shall be paid to the commissioner.

(4) Any company appointing and licensing an agent as provided in this section may upon proper application to the commissioner and upon the surrender of the license revoke or otherwise terminate the license of any agent appointed by and licensed in behalf of the company. In lieu of surrender of such license, the company may furnish to the commissioner proof that it has made reasonable effort to secure such license and that it has sent to the licensee written notice that application for a termination of his license has been made to the commissioner. Upon

such revocation or termination the agent or any person having possession of said license shall return the same to the commissioner upon demand.

(5) The license issued to an established agency of any company in any city, town or village may be transferred by the commissioner to another qualified agent or agency upon proper application by the company and without exacting further fees.

736.410 *Certification and licensing of solicitors; fee; revocation of license.* (1) Every person duly authorized and licensed as an insurance agent to represent any company or companies as provided in ORS 736.405, may employ as solicitors any individuals who hold, or have qualified for, a solicitor's license under the provisions of ORS 736.410 to 736.425. A certificate showing the name and address of the solicitor employed and the classes of business he is authorized to solicit for such agent shall be filed with the commissioner by such agent at the time of each such employment. The solicitor shall at all times keep the commissioner and his employing agent informed of his current address. The commissioner, if he finds the solicitor qualified, thereupon shall issue to each such solicitor a license to solicit contracts of insurance, solely on behalf of the agent employing him, for the balance of the current year ending March 31 following the date of such employment.

(2) The commissioner shall not issue to the same individual a solicitor's license and an agent's license for the same kind of insurance to be concurrent.

(3) An individual may apply for and the commissioner may issue to the same individual more than one current solicitor's license to solicit any kind of insurance authorized under the laws of this state, but no solicitor shall be licensed to solicit for the same kind of insurance for more than one agent.

(4) Every such license for each such solicitor shall be renewed during the month of March in each year for the ensuing year upon proper application to the commissioner by the agent employing him. Renewal of a solicitor's license may be accomplished by the continuance of the existing license for the ensuing year upon proper application to the commissioner by the employing agent. The fee for issuing or renewing such license shall be as provided in ORS 736.130 and shall be paid to the commissioner.

(5) Any agent employing and licensing a solicitor as provided in the section may, upon proper application to the commissioner and upon the surrender of the license, revoke or otherwise terminate the license of any solicitor employed by him. In lieu of surrender of such license, the agent may furnish to the commissioner proof that it has made reasonable effort to secure such license and that it has sent to the licensee written notice that application for termination of his license has been made to the commissioner. Upon such revocation or termination the solicitor or any person having possession of said license, shall return the same to the commissioner upon demand.

(6) Nothing in ORS 736.410 to 736.425 authorizes any insurance agent to employ solicitors for life insurance.